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Supreme Court of the United States

OCTOBER TERM, 19

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SUPREME COURT, U.S.

No. 277

JACK NEILSON, INC.,

Petitioner,

versus

THOMAS JORDAN, INC.,
Claimant & Owner of the Barge TJ-68,

Respondent.

Writ of Certiorari or Review to the United States Court of Appeals for the Fifth Circuit

ORIGINAL BRIEF ON BEHALF OF JACK NEILSON, INC., PETITIONER.

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ORIGINAL BRIEF ON BEHALF OF JACK NEILSON, INC., PETITIONER.

Jack Neilson, Inc., prays that a writ of certiorari issue to review the judgment of the decree of the United States Court of Appeals for the Fifth Circuit which was entered on March 23, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is unreported, however, it is set forth in our appendix A, pages 17-24.

The opinion of the United States Court of Appeals for

the Fifth Circuit is reported at 374 Fed. 2d 508 and is set forth in our appendix B, pages 25-26.

JURISDICTION

The Jurisdiction of this Court is invoked under Title 28, U.S. Code, Section 1254(1).

QUESTIONS PRESENTED

Whether the plea of laches filed herein by respondent impleaded, Jack Neilson, Inc., petitioner in this application for a writ, were properly overruled. Although the libel herein was ostensibly filed against the Barge TJ-68, no attempt was made to seize her until approximately four and one-half years after the repairs were performed. Jack Neilson, Inc., was impleaded as a respondent herein approximately five years after the original work allegedly performed by the libellant on the barge in question was performed.

The question presented, under the circumstances, was whether the plea of laches should have been sustained and the impleader under Admiralty Rule 56 against respondent-impleaded, Jack Neilson, Inc., should have been dismissed.

STATUTORY PROVISIONS

46 U.S. Code, Section 971, provides:

> "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel."

46 U.S. Code, Section 974, provides:

> "Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States."

STATEMENT OF FACTS

The original libel was filed herein by McMillan Welding & Machine Works against General Towing Company and its partners, on July 13, 1962, and an amended libel was filed on August 23, 1962. The claim of McMillan arose between June 14, and June 18, 1960, and stemmed from certain repairs to the Barge TJ-68. Approximately twenty-five (25) months after the original repairs were performed, libellant sought to assert its claim in admiralty against the Barge TJ-68. Thereafter, on May 21, 1965, Thomas Jordan, Inc., the owner of Barge TJ-68, appeared in the proceedings claiming to be the owner of the said barge and impleaded Jack Neilson, Inc., under Admiralty Rule 56 pursuant to a contract of indemnity executed by Jordan with Neilson.

Thomas Jordan, Inc., pleaded the laches of the original libellant, McMillan, in asserting their claim of lien against the Barge TJ-68. Respondent-impleaded, Jack Neilson,

Inc., petitioner in this application for a writ, pleaded the laches of the original libellant, McMillan, and the laches of Jordan as a bar herein to any recovery against Neilson.

A certain letter was written to Jack Neilson, Inc., during the month of August of 1962, by Thomas Jordan, Inc. (See Exhibit TJ #1 and TJ #2); however, no suit was filed or no petition of impleader was filed against Jack Neilson, Inc., until almost three years later. A letter written by the attorneys for Thomas Jordan, Inc., on December 13, 1962, actually indicated that they felt that the claim of lien was improperly asserted, and that any attempts to seize the barge would result in suit for damages being filed (See Exhibit P-10). A letter written by Thomas Jordan, Inc. on Aug. 23, 1962, likewise indicated that the lien claim of McMillan was being improperly asserted (See Exhibit TJ #1, 2 and 3.). The attorneys representing the original libellant, McMillan, did not in fact make any serious attempt to seize the Barge TJ-68 until immediately following a pre-trial conference in the office of the District Judge in December of 1964, and thereafter a letter of undertaking was posted by Thomas Jordan, Inc., and the impleader was filed under Admiralty Rule 56. On May 21, 1965, almost five years after the original repairs to the barge were made, Thomas Jordan, Inc., appeared in the proceedings claiming to be the owner of the Barge TJ-68, and impleaded Jack Neilson, Inc., (R. 36).

STATEMENT OF THE CASE

The claim of McMillan Welding & Machine Works arose from certain repairs allegedly performed on the Barge TJ-68 between June 14 and June 18, 1960. The Barge TJ-68 was owned by Thomas Jordan, Inc., and was chartered to Jack Neilson, Inc. The tug Capt. Marie, owned by General Towing Company, was hired to tow the said

Barge TJ-68, and while the said barge was under tow in the Mississippi River, she was run aground. Repairs to the barge were ordered by personnel of the tug. The original libel was filed against General Towing Company and its partners and the Barge on July 13, 1962, and an amended libel was filed on August 23, 1962. Approximately twenty-five months after the original repairs were performed, libellant sought to assert its claim in admiralty against the Barge TJ-68, however, no attempt was made to seize the Barge TJ-68 until more than four years after the repairs were performed. It was not until May 21, 1965, or almost five (5) years after the original repairs to the barge were made, that Thomas Jordan, Inc., appeared in the proceedings and claimed to be the owner of the Barge TJ-68, and impleaded Jack Neilson, Inc., under Admiralty Rule 56 pursuant to a contract of indemnity executed by Jordan with Neilson.

The trial commenced on September 24, 1965, and judgment was rendered by the United States District Court for the Eastern District of Louisiana, on November 5, 1965. An appeal was subsequently taken to the United States Court of Appeals for the Fifth Circuit, and a decree was handed down by the Fifth Circuit Court of Appeals on March 23, 1967.

Thereafter, applicants filed this application for a writ of certiorari or review to the Honorable Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

Your Honors will note that Jack Neilson, Inc., respondent impleaded herein and petitioner in this application for a writ of certiorari or review, was originally a charterer of the Barge TJ-68 and that Thomas Jordan, Inc.,

respondent, was her owner. The barge was in tow of the Tug Marie, which had full care, custody and control of the barge. Neither respondent (Jordan) nor respondent-impleaded (Neilson) had any agent, servant or employee aboard her at the time of the grounding causing the damages necessitating the repairs sued upon herein. No demand was ever made against Jack Neilson, Inc., for payment of the damage to the barge. Two letters were written approximately two years after the repairs were completed, the purpose of which was to allegedly put respondent-impleaded on notice that some type of claim would be filed against it. No legal proceedings were ever instituted against respondent impleaded until almost five years after the original repairs were performed and even then, the legal proceedings were never brought by the libellant, nor did the libellant seek to seize the barge in question.

The whole reason for granting the instant application for a writ of certiorari or review is to ascertain whether a plea of laches will be sustained where almost five years elapses before any action is taken judicially to effect a seizure or assert a claim judicially against a vessel. Laches has, historically, been a significant defense in the admiralty law, and generally constitutes a waiver of a claim of maritime lien because of no attempt to seize the vessel within a reasonable period of time. In the instant case, no attempt was ever made to seize the barge in question for more than four years, and no attempt was made to implead Jack Neilson, Inc., respondent impleaded, for almost five years after the performance of repairs on the barge in question.

Libellant's alleged lien, in order to be valid, must arise under 46 U.S.C.A., Section 971, et seq., which supersedes all state statutes on the subject of maritime liens. Since

the adoption of the statutes in 1920, the State Maritime Lien Statutes and their corresponding limitation or prescriptive periods have been held inapplicable. *Pascagoula Dock Station vs. Merchants & Marine Bank*, 271 F. 2d 53 (5th Cir., 1959). However, the time within which maritime liens must be asserted is now governed by the maritime principles of laches which in general terms comes into play after the passage of time accompanied by prejudicial harm to the party affected. *McConville v. Florida Towing Co.*, 321 F. 2d 162, (5th Cir., 1963).

There is no question but that Neilson was prejudiced by the delay in impleading it in this action. When Neilson was impleaded, on May 21, 1965, more than two years had elapsed since the sale of the Tug Capt. Marie at a Marshal's sale. This Marshal's sale occurred on February 28, 1963 (R. 59-61) and Neilson was not impleaded until May 21, 1965, or approximately twenty-seven months later. Considering that Neilson was first impleaded herein by action in a court of admiralty on May 21, 1965, it is clear that prejudicial harm to Neilson had occurred twenty-seven months earlier. When Neilson was impleaded in May of 1965 he had no rights over against the Tug Marie.

In considering maritime liens for supplies and necessaries, including repairs, admiralty courts have generally looked to the applicable state statutes to determine the limitations. *The Mendotta* II (D.C. N.Y. 1935), 13 F. Supp. 1019; *Davis v. The Nola Dare*, 157 F. Supp. 420 (E.D. N.C. 1958); *Phelps v. The Cecelia Ann*, 199 F. 2d 627 (4th Cir., 1952).

The applicable state statutes in this matter must be either that of Mississippi, the apparent situs of the contract for performance of the services and of part of the performance, that of Louisiana where the libel to assert

the lien has been brought, or that of Arkansas, where part of the services were performed. The Mississippi Statute, Title 3, Section 340, Mississippi Code, provides:

> "There shall be a lien on all ships, steamboats and other water craft for work done or materials supplied by any person in this state for or concerning the building, repairing, fitting, furnishing, supplying, or victualting such ships, steamboats, or other water craft, and for the wages of the person employed on board such vessel, boat, or craft, for work done or services rendered, in preference to all other debts due and owing from the owners thereof. The said lien shall expire six months after the claim is due, unless judicial proceedings have been commenced to assert it."

While the applicable Louisiana Statute is found in Civil Code Art. 3237, as follows:

> "The following debts are privileged on the price of ships and other vessels, in the order in which they are placed:
>
> * * * * *
>
> "8. Sums due to sellers, to those who have furnished materials and to workmen employed in the construction, if the vessel has never made a voyage; and those due to creditors for supplies, labor, repairing, victuals, armament and equipment, previous to the departure of the ship, if she has already made a voyage."
>
> * * * * *
>
> "The term of prescription of privileges against ships, steamboats and other vessels shall be six months."

The Arkansas statute is found in the Arkansas Revised Statutes, Chapter 6, as follows:

"51-601. Lien upon building, land or boat—Persons entitled to—Penalty for failure to discharge liens upon payment. — Every mechanic, builder, artisan, workman, laborer or other person who shall do or perform any work upon, or furnish any material, fixtures, engine, boiler or machinery for any building, erection, improvement upon land, or upon any boat or vessel of any kind, or for repairing same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contract or subcontractor, upon complying with the provisions of this act (§§ 51-601, 51-604-51-626), shall have for his work or labor done, or materials, fixtures, engine, boiler or machinery furnished a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor on which the same are situated, to the extent of one acre; or if such building, erection or improvement be upon any lot of land in any town, city or village then such lien shall be upon such building, erection or improvements, and the lots or land upon which the same are situated; or if such erection or improvement be upon any boat or vessel, then upon such boat or vessel, to secure the payment of such work or labor done, or materials, fixtures, engine, boiler or machinery furnished as aforesaid * * * ."

* * * * *

"51-613. Account filed with circuit court clerk—Contents.—It shall be the duty of every person who wishes to avail himself of this act (§§ 51-601, 51-604-51-626) to file with the clerk of the circuit court of the country in which the building, erection or other improvement to be charged with the lien is situated, and within one hundred and twenty (120) days after the things aforesaid shall have been furnished or the work or labor done or performed, a just and true account of the demand due or owing to him, after allowing all credits, and

containing a correct description of the property to be charged with said lien, verified by affidavit."

* * * * *

"51-616. Limitations of action. — All actions under this act (§§ 51-601, 51-604-51-626) shall be commenced within fifteen (15) months after filing the lien and prosecuted without unnecessary delay to final judgment, and no lien shall continue to exist by virtue of the provisions of this act, for more than fifteen (15) months after the lien shall be filed, unless within that time an action shall be instituted thereon as hereinbefore described."

Libelant is clearly late in asserting its rights.

In *Phelps v. The Cecelia Ann* (4th C.C.A.), 199 Fed. 2d 627, 1952 A.M.C. 1968, a delay of "over two years" was held to be too long in the face of a North Carolina Statute providing for a six-month period within which to claim a lien; in *Norfolk Sand & Cement Co. v. Owen* (4th C.C.A.), 115 Fed. 778, a delay of "fourteen or fifteen months" was held laches to bar enforcement; in *Southern Coal & Coke Company v. F. Grauds Kugniecibas* (1st C.C.A.), 93 F. 2d 732, 1938 A.M.C. 82, one (1) year was held too long; in *The Mendotta II* (D.C. N.Y. 1935), 13 F. Supp. 1019, sixteen (16) months was held too long, and in *Davis v. The Nola Dare* (E.D. N.C.), 157 F. Supp. 420, 1958 A.M.C. 951, twenty-one (21) months was held excessive.

The District Court denied the defense of laches on the ground that "both Neilson and Jordan knew of the claim made by libelant long before they were brought into this suit." Insofar as this relates to the first of the delays by Libelant, it is incorrect. The testimony is clear and uncontradicted that neither Jordan nor Neilson had any notice that libellant would seek to hold them responsible until

more than four years after the repairs were performed on the barge.

Respondent-impleaded, Jack Neilson, Inc., pleads the laches of the original libellant, McMillan, and the laches of Jordan as a bar herein to any recovery against it. It is clear that the mere institution of a suit does not relieve a party from the charge of laches, and if he failed in the diligent prosecution of the action, the consequences are the same as if no action had been taken. See *California Casualty Indemnity Exch. v. United States*, 74 F. Supp. 408 (S.D. Cal. 1947); *The Kermit*, 76 F. 2d 363 (9th Cir., 1935).

Laches is generally held to apply where two factors appear: (1) lapse of time, and (2) prejudice to a defendant. *United Fruit Co. v. The M. D. Whiteman*, 125 F. Supp. 898 (E.D. La. 1954); *Phelps v. The Cecelia Ann*, 199 F. 2d 627 (4th Cir., 1952); *Merchants and Marine Bank v. T. E. Welles*, 289 F. 2d 188 (5th Cir., 1961). Likewise it has even been held that the neglect of an attorney or proctor in seizing a vessel is no defense to a claim of laches. See *Marshall v. International Mercantile Marine Co.*, 39 F. 2d 551 (2d Cir., 1930).

The District Court held that the defense of laches was inapplicable and stated:

> "We hold at the outset that the defense of laches is not well-founded. Both Neilson and Jordan knew of the claim made by libelant long before they were brought into this suit. This is evidenced by correspondence between the parties. Jordan received notice on July 17, 1962, and shortly thereafter on August 23, 1962, it made demand on Neilson to defend the suit and to hold it harmless under its written charter agreement. In addition to actual notice,

> neither party has been able to show prejudice. The only claim of prejudice is that the CAPTAIN MARIE was sold at a Marshal's sale in February 1963, thus depriving claimants of a lien against the tug. However, it will be noted that the sale took place some seven months after this suit was instituted, ample time within which to effect a seizure. Furthermore, we will not penalize libelant for attempting to settle its claim out of court. The defense of laches is therefore rejected."

Thus Your Honors can see that the basis of denial of the claim of laches is the alleged demand upon Neilson of August 23, 1962. However, Your Honors will note by reference to the letter of August 23, 1962 and of December 13, 1962 that there appears to be a sound and genuine basis for denial of liability therein, and at no time until May 21, 1965, almost three years later, is respondent, Jack Neilson, Inc., impleaded. Shortly prior thereto Thomas Jordan, Inc., is threatened with a seizure of the Barge TJ-68. The crux of the question is whether mere demand or notice of a claim by letter which appears to deny liability originally is sufficient to bar a claim of laches. We submit that the law requires the bringing of suit, and not merely the forwarding of a letter of demand. In connection with this contention, we refer the Court to various statements appearing in the jurisprudence which clearly indicate that the only way to stop laches from running is to file a suit—not merely to write a letter.

In *Young v. The Key City*, 14 Wall, 653, 81 U.S. 653, 20 L. Ed. 896 (1871), the U. S. Supreme Court states:

> "The authorities on the subject of lapse of time as a defense to suits for the enforcement of maritime liens are carefully and industriously collected in the briefs of counsel on both sides, to which reference is hereby made without specifying them more particularly.

"We think that the following propositions as applicable to the case before us may be fairly stated as the result of these authorities:

1. That while the courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the **judicial enforcement** of maritime liens will, under proper circumstances, constitute a valid defense." (Emphasis supplied)

In *United Fruit Co. v. The M. D. Whiteman*, 125 F. Supp., 898 (E.D. La. 1954), the Court states:

"Under doctrine of laches, no set limitation is placed on the time **for bringing suit.**" (Emphasis supplied)

In *Merchants & Marine Bank v. The T. E. Wells*, 289 F. 2d 188 (5th Cir., 1961), the Fifth Circuit Court of Appeals indicates that a lien may become stale and unenforceable because of laches "from failure to commence judicial proceedings." See 289 F. 2d 188 at p. 191.

In *Cleary Brothers, Inc., v. Luria Steel & Trading Corp.*, 198 F. Supp. 567 (D.C. N.Y. 1960) the Court states:

"Libellant's allegations do not aver sufficient facts to prove the absence of laches. The general allegation that there were numerous settlement discussions would not excuse the delay, and **the fact that respondent had timely notice of the claim would not of itself rebut laches. Timely notice would enable respondent to prepare its defense but nothing will take the place of prompt institution of suit and the resulting avoidance of prejudice arising from death or forgetfulness of witnesses.** * * * " (Emphasis supplied)

The District Court, therefore, purports to deny the claim of laches based upon notice set forth in the letter of

July 17, 1962 to Jordan, and the letter of August 23, 1962 to Neilson; however, the above authorities clearly indicate that for the defense of laches to be inapplicable, a suit must be filed—not only furnishing of notice by mail. In other words, the notice of the alleged claim of libellant, McMillan, by correspondence and without any attempt to actually subject Barge TJ-68 to seizure, was insufficient to prevent the defense of laches from applying herein.

Your Honors can take judicial notice of the fact that many claims are asserted that are never actually litigated. This is exactly what happened here insofar as McMillan is concerned. McMillan never contacted Neilson about the claim until long after the repairs were completed and was advised by Neilson that it was not responsible therefor (R. 192). McMillan thereafter obviously abandoned any claim against Neilson. Likewise, no attempt was made to libel the barge by McMillan until twenty-five months after the original repairs were performed, at which latter time Jordan sought to find out what the suit was about (R. 186). No further attempt was ever made by McMillan to libel or seize the barge for an additional two years, or a total of more than four years, and this lack of diligence can only be deemed an abandonment of any claim alleged against the barge in question. It is abundantly clear from the decided cases that the neglect of an attorney or proctor to seize a vessel is no defense to a claim of laches. See *Marshall v. International Mercantile Marine Co.*, 39 F. 2d 551 (2nd Cir., 1930). It is clear that the lapse of time between the filing of the original libel, on July 13, 1962, and the filing of the impleader under Admiralty Rule 56 on May 21, 1965, or almost five years after the original repairs to the barge were made, is sufficient delay to bar any claim against Jack Neilson, Inc., under Admiralty Rule 56. See *California Casualty Indemnity Exch., v.*

United States, supra holding that the mere institution of a suit does not relieve a party from the charge of laches, and if he failed in the diligent prosecution of the action, the consequences are the same as if no action had been taken. Similarly, the failure of McMillan to seize the Barge TJ-68 for more than two years after filing the libel can only be construed adversely to libellant.

Under the circumstances set forth herein, we respectfully submit that the plea of laches filed by Jack Neilson, Inc., and Thomas Jordan, Inc., is good, and that the plea of laches by the respondent and respondent-impleaded should have been sustained by the District Court and the Fifth Circuit Court of Appeals.

CONCLUSION

For the several reasons set forth above, respondent-impleaded, Jack Neilson, Inc., your petitioner herein, urgently prays that a writ of certiorari issue from this court to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered herein on March 23, 1967.

Respectfully submitted,

NATHAN GREENBERG,
848 Second Street,
Gretna, Louisiana,
Attorney for Applicant.

CERTIFICATE

I hereby certify that copies of the above and foregoing application for a writ of certiorari or review has been mailed to Wynn, Hafter, Lake & Tindall and Lemle & Kelleher, George A. Frilot, III, George B. Matthews, and Murphy Moss, Proctors for McMillan Welding & Machine Works, Rene A. Pastorek, Proctor for General Towing Company and its individual partners, Garrett & Carl, Clifton S. Carl, Proctors for General Towing Corporation, and Milling, Saal, Saunders, Benson & Woodward, and Neal D. Hobson, Proctors for Thomas Jordan, Inc., by depositing the same in the U. S. Mail, postage prepaid.

APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

NO. 5309
IN ADMIRALTY
DIVISION D

McMILLAN WELDING & MACHINE WORKS
Libelant

versus

GENERAL TOWING COMPANY AND THE INDIVIDUAL PARTNERS THEREOF AND BARGE TJ-248, ITS TACKLE, APPAREL, FURNITURE, ETC.
Respondents

Wynn, Hafter, Lake & Tindall
Greenville, Mississippi

Lemle & Kelleher
George A. Frilot, III
George B. Matthews
Murphy Moss

Proctors for McMillan Welding & Machine Works

Rene A. Pastorek

Proctor for General Towing Company and its individual partners

Garrett & Carl
Clifton S. Carl

Proctors for General Towing Corporation

Milling, Saal, Saunders, Benson & Woodward
Neal D. Hobson

Proctors for Thomas Jordan, Inc.

Nathan Greenberg

Proctor for Jack Neilson, Inc.

AINSWORTH, District Judge:

This is a libel filed by McMillan Welding & Machine Works to recover for repair services rendered to the barge TJ-68. The libel is brought in personam against the General Towing Company and/or Corporation, and the individual partners thereof in solido, and in rem against the barge TJ-68 owned by Thomas Jordan, Inc., which barge at the time was under written charter to Jack Neilson, Inc.

On June 14, 1960, the master of the tug CAPTAIN MARIE, owned by General Towing Company and under verbal charter to General Towing Corporation, engaged libelant to render emergency repair services to the TJ-68 which had been damaged while in tow of the CAPTAIN MARIE. The TJ-68 is a dumb barge, and at the time she was repaired was located about 40 miles from Greenville, Mississippi, in the Mississippi River. After checking the credit of General Towing Company and Thomas Jordan, Inc., libelant undertook to repair the barge TJ-68. The barge was listing badly and was in danger of sinking, which necessitated extensive pumping. However, the water was coming into the barge faster than she could be pumped. More pumps were obtained and a marine diver was engaged by libelant who was successful in plugging the hole in the barge so that she could be pumped. Thereafter, the barge was run upon the shore of the Mississippi so that the welding of the hole could be accomplished. In all, the repairs required three days and nights.

Libelant submitted its bill to General Towing Company, which considered the bill to be excessive. Thereafter, extensive correspondence took place between libelant and the towing company. Finally, after attempts to amicably settle its claim, libelant filed this suit on July 13, 1962. After suit was filed Jordan attempted to get General Towing and Neilson to defend the suit and to hold Jordan harmless and protect the TJ-68 from seizure. Failing in this, Jordan entered the suit as claimant of the TJ-68, answered the libel and impleaded Neilson under its contract of indemnity, and sought judgment over against Neilson and General Towing Company.

Libelant's claim is made against the General Towing Company and the individual partners thereof, in personam and in solido, and against General Towing Corporation, charterer of the CAPTAIN MARIE. The claim is based on the fact that the master of the CAPTAIN MARIE procured the repairs for the barge on behalf of the General Towing Company/Corporation. The master and crew of the CAPTAIN MARIE were employed by General Towing Corporation. Libelant's claim against the barge in rem is based on 46 U.S.C.A. § 971, which creates a lien on vessels for services, repairs, etc., under the circumstances there expressed. By supplemental libel, libelant also asserts in personam liability against Jordan, as owner of the barge, under the theory of quasi contract or unjust enrichment.

Thomas Jordan, Inc. contends that it is not liable for the repairs and alternatively since the damage to the barge was caused by the owners and/or operators of the CAPTAIN MARIE, should it be cast in judgment, it asserts its claim over against General Towing Company and/or Corporation. Jordan's claim over against Neilson is one of indemnity under the written charter agreement between

Jordan and Neilson. This right of indemnity has never been denied by Neilson. Jordan also seeks $1,000 as reasonable attorney's fees for having been compelled to defend this suit.

Neilson contends that the claims of both libelant and Jordan are barred by laches since it was not brought into this suit until May 21, 1965.

The defense of the General Towing Company, the partnership, is that the tug CAPTAIN MARIE was under charter to the General Towing Corporation; that the corporation was formed for the purpose of operating the CAPTAIN MARIE and to provide marine services. The corporation paid the notes made for the purchase of the tug, paid the insurance, hired the crew, maintained corporate records and a banking account, made all disbursements for repairs, supplies, etc. The partnership arose merely for the purchase of the CAPTAIN MARIE. There was never any formal partnership agreement; it had no books or records and no accounts. The partnership asserts that the claim herein arose out of corporate activity and was not that of the partnership or of the individual members.

The defense of the corporation goes to the amount of the claim rather than its validity. It asserts that the charges are excessive.

We hold at the outset that the defense of laches is not well-founded. Both Neilson and Jordan knew of the claim made by libelant long before they were brought into this suit. This is evidenced by correspondence between the parties. Jordan received notice on July 17, 1962, and shortly thereafter on August 23, 1962, it made demand on Neilson to defend the suit and to hold it harmless under

its written charter agreement. In addition to actual notice, neither party has been able to show prejudice. The only claim of prejudice is that the CAPTAIN MARIE was sold at a Marshal's sale in February 1963, thus depriving claimants of a lien against the tug. However, it will be noted that the sale took place some seven months after this suit was instituted, ample time within which to effect a seizure. Furthermore, we will not penalize libelant for attempting to settle its claim out of court. The defense of laches is therefore rejected.

As to the reasonableness of the bill, we hold that there is not satisfactory evidence to contradict the amount claimed of $3,147.36. Respondents produced a marine surveyor who admittedly did not examine the barge or repairs in question but made his judgment after examining only the bill submitted by libelant to General Towing Company. He suggested a figure of $2,500 which was not acceptable to General Towing Company because this was the deductible provided in its policy of marine insurance. Obviously the surveyor had an interest in submitting that particular figure. We are convinced that the amount claimed is fair and reasonable. No reliable evidence to the contrary has been shown by respondents. Libelant is entitled to recover on its claim.

The General Towing Corporation's employee ordered the repairs and has not denied its liability in this respect. It objected only to the amount of the charges and to the late date at which "fault" was brought into the case. However, its objection to the question of "fault" goes only to the impleading petition filed by Thomas Jordan, Inc., on the morning of the trial. It does not affect the claim of libelant. In view of the fact that there is no evidence as to how the accident occurred, or who was at fault, we can-

not decide that claim on the merits. We hold that the libelant's claim against General Towing Corporation is valid.

Libelant's claim against the General Towing Company and the individual partners thereof is denied because the partnership and individuals had nothing to do with the events or activities that brought on this litigation. The corporation was the charterer and owner pro hac vice of the CAPTAIN MARIE. The use to which the tug was put by the corporation was corporate activity. It is true that the partners of the General Towing Company were also the incorporators and officers of the General Towing Corporation. However, it is fundamental that a corporation has a separate and distinct existence apart from its stockholders and officers, and in the absence of fraud, the liability of the corporation is not the liability of the shareholders or officers thereof. See LSA-R.S. 12:19 and *L. L. Ridgway Company v. Marks*, La. App. 4 Cir., 1962, 146 So. 2d 61. There is no allegation by any party that the individuals of the General Towing Corporation have perpetrated a fraud or that they are guilty of some criminal wrongdoing. Therefore, there can be no in personam liability on the part of the General Towing Company or of the individual partners thereof.

Libelant's claims against Thomas Jordan, Inc. in personam, and against the barge TJ-68 in rem, are well-founded. Under 46 U.S.C.A. 971, libelant is entitled to a lien against the TJ-68. Repairs were made to the vessel upon the order of a person authorized by the owner within the meaning of the statute. It is true that Jordan had no direct connection in causing the repairs to be made. However, under 46 U.S.C.A. 972 a "person authorized" includes a "master" and his authority arises by presumption. Furthermore, the persons presumed to have authority un-

der 46 U.S.C.A. 972 include such officers and agents when *appointed by a charterer*, or by an owner pro hac vice, as provided in 46 U.S.C.A. 973. The only admonition against a repairman is that he is presumed to have knowledge of the charter and cannot claim a lien when the charter prohibits the incurring of liens on the credit of the vessel. However, the charter between Jordan and Neilson makes no such prohibition. In fact, the charter agreement contemplates that liens would arise since it states:

> "The Charterer shall indemnify and hold harmless Thomas Jordan, Inc. against any liens of any nature upon the barge and against any claims or demands against Thomas Jordan, Inc., arising out of the condition or operation of the barge during the charter period which may be asserted against Thomas Jordan, Inc. * * *"

If Jordan wanted to protect itself it had a ready means available by simply prohibiting the creating of maritime liens in its charter, which it did not do. See *Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co.*, 310 U.S. 268, 60 S. Ct. 937 (1940). Jordan cannot now be heard to complain that a lien has been perfected against its vessel. Jordan is liable to libelant in personam because it owned the vessel repaired and has received the benefits of those repairs and did not prohibit reliance on the credit of the vessel.

In holding Jordan liable, we recognize its claim over against Neilson under its charter agreement. The language of the indemnity agreement is clear and is not controverted by Neilson. Likewise, Jordan is entitled to $1,000 as reasonable attorney's fee in defending this suit. Jordan is the indemnitee under its agreement with Neilson and was under no obligation to undertake to defend this claim. The defense of this action rested with Neilson

and General Towing Corporation. It was only after demand was made on both that Jordan appeared to protect its interest in the TJ-68. It was the refusal of Neilson and General Towing Corporation to defend which compelled Jordan to defend the very circumstance for which it was to be indemnified. Having been compelled to resist the liability for which the indemnity issued, Jordan is entitled to the attorney's fees as claimed, which are fair and reasonable. See *Rederi A/B Dalen v. Maher*, La. App. 4 Cir., 1962, 303 F. 2d 565; *Pure Oil Company v. Geotechnical Corp. of Delaware*, E.D. La. 1955, 129 F. Supp. 194.

Jordan's claim over against the General Towing Corporation is denied because there has been no proof of fault in this regard. The only evidence on this point came by way of an off-hand comment from a witness while testifying. It was not in response to a question directed at proof of fault, for in fact, there was no attempt to prove fault during the trial.

Accordingly, the Clerk will prepare a decree for judgment in libelant's favor against General Towing Corporation and Thomas Jordan, Inc., in personam and in solido, and against the barge TJ-68 in rem for $3,147.36 with interest from July 27, 1960, and Thomas Jordan, Inc. will have judgment over against Jack Neilson, Inc. for full indemnity under its charter agreement for any amount it is obliged to pay under this judgment plus $1,000 for reasonable attorney's fees.

Decree accordingly.

ORIGINAL SIGNED
Robert A. Ainsworth, Jr.

UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
November 5, 1965

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23655

THOMAS JORDAN, INCORPORATED,
Appellant-Appellee,

versus

McMILLAN WELDING & MACHINE WORKS,
Appellee-Appellant.

JACK NEILSON, INC.,
Appellant,

versus

THOMAS JORDAN, INC., Claimant & Owner of the Barge TJ-68,
Appellee-Appellant.

McMILLAN WELDING & MACHINE WORKS,
Appellant-Appellee,

versus

GENERAL TOWING COMPANY and the individual partners thereof and barge TJ-248, its tackle, apparel, furniture, etc.,
Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

(March 23, 1967.)

Before BROWN, MOORE,* and BELL, Circuit Judges.

PER CURIAM: The Barge, TJ-68, owned by Thomas

* Of the Second Circuit, sitting by designation.

Jordan, Inc. (Jordan), was damaged while in tow of the Tug "CAPTAIN MARIE," owned by General Towing Company (the Company) and under an alleged verbal charter to General Towing Corporation (the Corporation). Libelant, McMillan Welding & Machine Works (McMillan) was engaged to make emergency repairs. The TJ-68 was under written charter to Jack Neilson, Inc. McMillan submitted its bill to the Company. Failing to secure payment, McMillan filed suit against Jordan, which in turn entered the suit as claimant of the TJ-68, impleaded Neilson under its charter indemnity and sought judgment over against Neilson and the Company. McMillan's claim against the Company, the Corporation, as charterer of the Tug and Jordan was in personam; against the TJ-68 in rem. Neilson asserted laches as an affirmative defense to the claims of McMillan and Jordan.

The repairs were duly authorized under the circumstances and were obviously necessary to save the TJ-68 from further damage or total loss. The Trial Court found in a well-reasoned opinion that the repair bill of $3,147.36 was reasonable; that McMillan was entitled to recover on its claim in personam against Jordan and the Corporation and in rem against the TJ-68; that Jordan was entitled to recover against Neilson on its indemnity plus a $1,000 attorney's fee because of being compelled to defend; that the defense of laches was not well founded, there being no showing of prejudice; but that there being no proof of fault, Jordan's claim over against the Corporation should be denied. A review of the record reveals that the judgment is based upon an accurate application of the law to the established facts and, accordingly, the judgment is

AFFIRMED.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1966

No. 23655

D. C. Docket No. Adm. 5309 "D"

THOMAS JORDAN, INCORPORATED,
Appellant-Appellee,

versus

McMILLAN WELDING & MACHINE WORKS,
Appellee-Appellant.

JACK NEILSON, INC.,
Appellant,

versus

THOMAS JORDAN, INC., Claimant & Owner of the Barge TJ-68,
Appellee-Appellant.

McMILLAN WELDING & MACHINE WORKS,
Appellant-Appellee,

versus

GENERAL TOWING COMPANY and the individual partners thereof and barge TJ-248, its tackle, apparel, furniture, etc.,
Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before BROWN, MOORE,* and BELL, Circuit Judges.

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* Of the Second Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; all parties to bear their own costs of appeal.

March 23, 1967

Issued as Mandate: APR 14 1967